HAROLD B. WILLEY, Clerk

No. 466

IN THE

SUPREME COURT OF THE UNITED STATES

MRS. CAROLYN M. ABNEY, ET VIR,
JAMES K. ABNEY,
Petitioners

vs.

ELLIS CAMPBELL, JR., COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOONEY, CLARK & MOORHEAD
R. DEAN MOORHEAD
Brown Building
Austin, Texas

Counsel for Petitioners

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Specification of Errors To Be Urged	5
Reasons for Granting the Writ	5
Conclusion	21
Signature of Counsel	21
Appendix "A"	23

AUG 9 1955

217247

AUTHORITIES

	Page
Brushaber v. Union Pacific Railroad Company, 240 U.S. 1, 36 S. Ct. 236	15
Citizens National Bank v. Kentucky, 217 U.S. 443, 30 S. Ct. 532	20
Clement National Bank v. Vermont, 231 U.S. 210, 34 S. Ct .31	20
Cooley on Constitutional Law (7th Ed.) 680	7
Flint v. Stone Tracy Company, 220 U.S. 107, 31 S. Ct. 342	7
Glenn L. Martin Company v. United States, 100 F. (2d) 793	9
Helvering v. Davis, 301 U.S. 619, 57 S. Ct. 904	7, 14
In Re Opinions of the Justices ,190 Atl. 801	17
Monamotor Oil Company v. Johnson, 292 U.S. 86, 54 S. Ct. 575	19
Pierce Oil Corporation v. Hopkins, 264 U.S. 137, 44 S. Ct. 251	19
Steward Machine Company v. Davis, 301 U.S. 548, 57 S. Ct. 883	7, 16
Thomas v .United States, 192 U.S. 363, 24 S. Ct. 305	7

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MRS. CAROLYN M. ABNEY, ET VIR,
JAMES K. ABNEY,
Petitioners

vs.

ELLIS CAMPBELL, JR., COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 18, 1953.

Opinions Below

The opinion of the District Court (R. 30-33) is reported in 105 F. Supp. 740. The opinion of the Court of Appeals (R. 39-50) is reported in 206 F. (2d) 836.

Jurisdiction

The judgment of the Court of Appeals was entered on August 18, 1953 (R. 51). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

Question Presented

The sole question in this case is whether the 1950 amendment to the Federal Insurance Contributions Act, whereby the coverage of said Act was extended to certain domestic employees in a private home, is valid under the Constitution of the United States.

Statutes Involved

The pertinent statutory provisions are set forth in Appendix "A", *infra*, pp. 23-24.

Statement

This is a suit for the recovery of taxes seized from Petitioners under the Federal Insurance Contributions Act (26 U.S.C. sec. 1400-1432). The facts were stipulated. During the first calendar quarter of the year 1951, Petitioners paid cash remuneration to an employee for domestic service in their private home in an amount sufficient to render them liable for the sum of $4.68 under the provisions of the Act, if the Act is constitutional as applied to them (R. 2-3, 13). One-half of this amount was due as the "excise tax" levied upon Petitioners by 26 U.S.C. sec. 1410, and the other one-half was the "additional income tax on employees" which the Act requires Petitioners to withhold from the wages of their employee.

Petitioners paid their employee the full amount of the wages due her for this calendar quarter, without withholding the amount of the "additional income tax on employees." However, the employee herself paid the additional income tax on her wages for this period (R. 13). Hence, under 26 U.S.C. sec. 1622(d), Petitioners were liable only for the amount of the excise tax. The amount of this tax, plus interest or a penalty, was $2.51 (R. 13).

Petitioners reported to the Commissioner of Internal Revenue the amount of cash remuneration which they paid for domestic service in their private home during the first calendar quarter of 1951, but, because of their belief that the Federal Insurance Contributions Act is unconstitutional as applied to them, Petitioners did not pay to Respondent the aforementioned amount of $2.51 (R. 3, 13).

During the second and third calendar quarters of 1951, Petitioners paid cash remuneration to an employee for domestic service in their private home in an amount sufficient to render them liable for the sum of $10.06, if the Act is constitutional as applied to them (R. 18). Petitioners also reported to the Commissioner of Internal Revenue this amount of cash remuneration paid by them for these two quarter years, but they did not pay to Respondent the sum of $10.06.

During these two quarter years, Petitioners' domestic employee did not herself pay the additional income tax on her wages, as she had done during the first quarter. Hence, if the Act can be applied to Petitioners, Petitioners were liable for the full sum

of $10.06 for the second and third calendar quarters of 1951 (R. 18).

On August 6, 1951, Respondent caused to be seized from Petitioners' bank account the sum of $2.51 (R. 3, 13), and on February 13, 1952, he caused to be seized from such bank account the sum of $10.06 (R. 18-19). No question is raised in this case concerning the regularity of the methods employed in these distraints.

Within the period provided by law, Petitioners filed with Respondent claims for refund of the amounts so seized, alleging as a basis for such claims that the Federal Insurance Contributions Act is unconstitutional as applied to them (R. 3-4, 13, 19). The claims were disallowed, and this suit for refund was filed within the time required by law for the institution of such a suit after the disallowance of a claim for refund.

The trial court rendered judgment that Petitioners take nothing by this suit (R. 34). The Court of Appeals affirmed such judgment (R. 51).

In both Courts below, Petitioners recognized that this Honorable Court has upheld the constitutionality of the Federal Insurance Contributions Act insofar as the Act applies to employers and employees in a business. However, Petitioners argued that, with respect to the power to tax, the status of a domestic employer and his employee is different from the status of a business employer and employee. The Court of Appeals rejected this argument and held that "in law and in fact there is no substantial difference between the relation of business employers

to their employees and that of domestic employers to theirs" (R. 47).

Specification of Errors To Be Urged

The Court of Appeals erred:

1. In failing to hold that the tax which the Federal Insurance Contributions Act levies upon domestic employers cannot lawfully be deemed to be an excise tax upon the relationship of employment between domestic employers and domestic employees.

2. In failing to hold that the Federal Insurance Contributions Act violates the Fifth Amendment to the Constitution of the United States by being arbitrary and discriminatory with respect to the wages paid for domestic service which are taxed and the wages paid with respect to the same service which are exempted from the tax.

3. In failing to hold that the withholding provisions of the Federal Insurance Contributions Act deprive domestic employers of their liberty and property in violation of the Fifth Amendment to the Constitution of the United States.

Reasons for Granting the Writ

In terms of money, this case is picayune. Indeed, the trial court observed that (R. 30):

". . . this case is almost *de minimis non curat lex.* It only involves $12.57."

Because of the nature of the statutes in issue, the amount involved in a case of this character necessarily must be small. Domestic employees customarily work on a part-time basis, and their wages are not as high as the wages paid to business employees. The two types of taxes levied by the Federal Insurance Contributions Act total only three percent of the wages paid to a domestic employee, and such taxes must be paid at the end of each quarter year. Hence, an average domestic employer is required to pay only a few dollars each tax period. If such an employer desires to challenge the validity of the Act, his challenge necessarily must be based upon the comparatively small amount of taxes which such Act exacts from him.

However, although this case is small in terms of money, it is massive in terms of its impact throughout the nation. The statutes in issue affect virtually every person who has an employee in his home. If the statute is unconstitutional, millions of dollars have been illegally exacted from hundreds of thousands of persons during the past three years. Although the Court of Appeals was of the opinion that prior decisions by this Honorable Court "in substance" compel a ruling against Petitioners, that Court conceded that the precise questions in this case have not been presented before this Court or decided by it (R. 44). Consequently, Petitioners respectfully submit that, in the language of Rule 38(5)(b) of this Court's Rules, this is a case in which there is "an important question of federal law which has not been, but should be, settled by this Court." For the reasons hereinafter set forth, Petitioners also

submit that this is a case in which the Court of Appeals has erroneously decided an important question of federal law.

1.

The Federal Insurance Contributions Act levies upon an employer "an excise tax with respect to having individuals in his employ," 26 U.S.C. sec. 1410. In *Flint v. Stone Tracy Company*, 220 U.S. 107, 31 S. Ct. 342, this Court, quoting from *Cooley on Constitutional Law* (7th Ed.) 680, said:

"Excises are 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses *to pursue certain occupations*, and upon corporate privileges.' " (Italics added.)

In *Thomas v. United States*, 192 U.S. 363, 24 S. Ct. 305, the Court referred to the power given Congress by Section 8 of Article I of the Constitution to levy taxes, duties, imposts and excises, and the Court said:

"There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, *particular business transactions, vocations, occupations and the like.*" (Italics added.)

In *Steward Machine Company v. Davis*, 301 U.S. 548, 57 S. Ct. 883, and in *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, the Court held that the tax

upon employers levied by the statute which is now the Federal Insurance Contributions Act was a valid excise tax. However, the tax which was considered and upheld in those two cases was a tax upon *business employments*. At that time the statute in no way covered *domestic employments*, and the Court so noted, 301 U.S. at 574 and 635. In upholding the tax, the Court stated in the *Steward* case, 301 U.S. at 581:

"What the individual does in the operation of a *business* is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. '*Business* is as legitimate an object of the taxing power as property.' City of Newton v. Atchison, 31 Kan. 151, 154, 1 P. 288, 290, 47 Am. Rep. 486 (per Brewer, J.). Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. Henneford v. Silas Mason Co., Inc. (March 29, 1937) 300 U.S. 577, 57 S. Ct. 524, 527, 81 L. Ed. 814. 'A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively.' Id.

"Employment is a *business relation*, if not itself a *business*. It is a relation without which *business* could seldom be carried on effectively. *The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them.* The whole includes the parts." (Italics added.)

As the Court recognized, Congress can impose an excise tax upon the operation of a business. Consequently, under the Court's reasoning, since Congress can "tax the activities and relations which constitute a calling as a unit," Congress can tax the relation-

ship of employment which is a part of such unit. As the Court stated in *Glenn L. Martin Company v. United States*, 100 F. (2d) 793 at 795, the taxes levied by the Federal Insurance Contributions Act are:

"imposed upon the relation of employment as one of the relationships embraced in the carrying on of business; and are sustained on the principle that 'the power to tax activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts.' "

Thus, this Court has upheld an excise tax upon employment only in connection with employment in a business, and it has done this upon the theory that, since Congress could tax the business as a whole, it could tax one element thereof.

Such a theory will not uphold a tax imposed upon domestic employment. Certainly, it cannot be thought that Congress can lay an excise tax upon the operation of a domestic household in the same manner that it can impose such a tax upon the operation of a business. If Congress cannot levy an excise tax upon the operation of a domestic household, the rationale which this Court employed in the *Davis* cases becomes inapplicable, and such cases in no way support the judgments below. Conversely, Petitioners respectfully submit, the tax upon domestic employments can be upheld only if the tax powers of Congress extend so far as to permit Congress to exact a tax for the privilege of operating a household.

In its opinion (R. 44), the Court of Appeals pointed to an English statute enacted in 1777 which

taxed the employers of certain types of male servants, and the Court seemingly thought that such statute affords a precedent for a tax such as the one which has been levied upon Petitioners. The English statute was an omnibus measure which levied a tax upon the employers of male servants, but which also levied a tax upon the owners of carriages and upon the owners of horses and mules. It is common knowledge that, at the time when the English statute was passed, servants were deemed akin to chattels. This is well shown by the fact that, in the statute, servants were linked with chattels such as carriages and horses and mules. A century ago, the owners of slaves in this country were taxed, with the taxes being based upon the theory that slaves were chattels or property. However, in this enlightened age when we have long since rejected the idea that employees are chattels of any character, it would scarcely seem that the fact that employers of male servants were taxed in England in 1777, or the fact that the owners of slaves were taxed in this country during the first half of the nineteenth century, could have any bearing upon the validity of a tax such as the excise tax levied by the Federal Insurance Contributions Act.

As is stated above, the opinion of the Court of Appeals is based upon the theory that "in law and in fact there is no substantial difference between the relation of business employers to their employees and that of domestic employers to theirs." (R. 47.) Petitioners respectfully submit that this theory is erroneous, and that, in the field of taxation, there are numerous substantial differences between the two relations. Thus:

(a) Wages paid by a business employer to his employees are deductible for income tax purposes, whereas wages paid by a domestic employer to his employee are not.

(b) Excise taxes paid by a business employer pursuant to the Federal Insurance Contributions Act are deductible for income tax purposes, whereas excise taxes paid under the same Act by domestic employers are not deductible.

(c) In a business, the expense of keeping the records and making the reports required by the Act is a deductible item for income tax purposes, whereas a domestic employer can obtain no deduction for the time and trouble caused him in the keeping of such records and in the making of such reports.

Until inequities of this character are remedied and the domestic employer is no longer discriminated against as compared to the business employer, Petitioners submit that the two employers cannot be deemed to be on a par for tax purposes.

2.

The Federal Insurance Contributions Act imposes an "excise tax" and an "additional income tax" upon the wages of a domestic employee only if:

(a) During a quarter year the employee has worked for one employer twenty-four days or more, and has received cash wages of $50 or more from such employer; or if

(b) Regardless of how long the employee worked during the quarter year, or how much he was paid,

taxes were due on his wages during the preceding quarter.

If a domestic employee does not work at least twenty-four days during a quarter year for one employer, no taxes are payable, unless taxes were payable during the preceding quarter. If the employee works for several employers, and even if he so works during every day of the quarter year, taxes are not payable unless he works for one employer for at least twenty-four days. Even though an employee works for one employer for at least twenty-four days, no tax is due unless he receives cash remuneration of at least $50. Even though he works for one employer every day of the quarter year, no tax is due if the bulk of his wages is in the form of non-cash remuneration, such as food and lodging, and if the total cash payments to him during the quarter year are less than $50.

Petitioners contend that this classification of the conditions under which wages paid for domestic service are or are not subject to the taxes levied by the Federal Insurance Contributions Act is wholly arbitrary and discriminatory, with the result that the Act is violative of the Fifth Amendment to the Constitution of the United States.

In connection with Petitioners' argument on this point, it is important that this Honorable Court notice two things. First, Petitioners fully recognize that Congress may levy a tax upon all income over a certain amount, while exempting income below such amount. If the Act merely provided that taxes would be levied if an employee received wages of more than $50 in a quarter year, but would not be levied if an

employee received less, this principle would be applicable, and the classification in terms of the amount of wages would be valid. However, as is hereinafter shown, such a situation does not exist in the case at bar.

Secondly, Petitioners realize that income can be classified according to its source, with income from one source being subject to a tax, while income from another source is not. Until January 1, 1951, wages received from domestic service were exempt from the taxes levied by the Federal Insurance Contributions Act. The validity of such an exemption rests upon the principle just mentioned.

However, neither of the foregoing principles is applicable to the case at bar. In this case, we do not have a classification based solely upon the amount of income. Neither do we have a classification based upon the source of income. Rather, we have a hybrid classification which is based in part upon the amount of income, in part upon the medium in which the income is paid, in part upon the number of days of work, and in part upon the taxable status during the preceding quarter year. The arbitrary and discriminatory nature of such a classification is revealed by the following illustrations:

(a) Assume that an employer employs a maid for twenty-four days during a quarter year at a wage of $4 per day, with the result that the maid receives total cash wages of $96. Under the Act, the employer must pay the excise tax on such wages, and the employee must pay the additional income tax.

(b) Assume, however, that another employer employs one maid for twelve days during a calendar

quarter, at a wage of $4 per day, and then employs a second maid for another twelve days at the same wage. This employer will have received the same amount of maid service as the first employer, to-wit, services for twenty-four days. This employer also will have paid the same amount for maid service as did the first employer, to-wit, cash wages in the amount of $96. However, since each maid only worked for twelve days and only received $48 in wages, this employer would not have to pay an excise tax, even though he received the identical service that the first employer did, and even though he paid the identical amount for such service.

(c) Assume, finally, that a third employer employs a maid for twenty-four days during a quarter year; that he pays her $2 per day in cash wages; but that he furnishes her with room and board which are reasonably worth $2 per day. This employer also receives maid service for twenty-four days. In terms of value, he too pays $96 for such service. However, since only cash wages are considered in the classification prescribed by the Federal Insurance Contributions Act, and since such cash wages are less than $50, this employer also is exempt from payment of any excise tax.

The Act states (26 U.S.C. sec. 1410) that the excise tax which is levied upon employers is "with respect to having individuals in his employ." In *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, this Court held that the excise is "upon the relation of employment." In the foregoing three illustrations, each employer enjoyed a "relation of employment" whereby he received the identical thing, to-wit,

twenty-four days of maid service. Each employer paid the identical amount of $96 to obtain maid service under such "relation of employment." Notwithstanding this, the Act taxes the first employer because of his "relation of employment," but exempts the last two employers.

The discrimination has still other aspects. An employer who does not use a domestic employee for twenty-four days during a quarter year and who does not pay such an employee cash wages of $50 ordinarily does not have to pay the tax levied by the Act. Thus, an employer who uses a maid for ten days during the quarter and pays her cash wages of $40 will not ordinarily be subject to a tax. However, if he has been subject to a tax with respect to such maid during the preceding quarter, he will be required to pay the tax during the current quarter, regardless of how long the maid works or how much he pays her during such quarter. Hence, two employers can each receive the identical amount of work and they can each pay the identical amount of cash wages, yet one can be subject to the tax, while the other is not, depending upon their taxable status during the preceding quarter. Such a result, and a classification which produces such a result, are wholly arbitrary.

In answering Petitioners' argument on this point, the Court of Appeals said that "Congress has the widest powers of selection and classification" (R. 47). This, of course, is true. However, Congress does not have *carte blanche* authority to adopt classifications which find no support whatsoever in logic or in considerations of policy. Thus, in *Brushaber v. Union*

Pacific Railroad Company, 240 U.S. 1, 36 S. Ct. 236, this Court stated that a tax statute will violate the due process clause of the Fifth Amendment to the Constitution of the United States if it is "so wanting in basis for classification" as to produce gross and patent inequality. Likewise, in *Steward Machine Company v. Davis*, 301 U.S. 548, 57 S. Ct. 883, this Court observed with respect to taxes levied by the Social Security Act:

"We assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."

It would indeed be difficult to discover discrimination more gross than that embodied in the Federal Insurance Contributions Act. Certainly, in a statute which purports to levy an excise tax upon the "relation of employment," there is no basis for any classification which taxes a relation of employment whereby an employer receives certain service from an employee for a certain sum, but which exempts from taxation an identical relation of employment whereby other employers receive identical services for identical sums. Petitioners are in the class which is the victim of such discrimination, and Petitioners respectfully contend that any application to them of the excise tax levied by the Act is violative of the Fifth Amendment.

3.

Under the Federal Insurance Contributions Act, an employer is required to withhold from the wages

paid his domestic employees the amount of the additional income tax imposed upon such employees; he is required to keep a record of the amounts which he withholds; he is required to report the amounts withheld to the government and to pay such amounts to the government; and he is required to furnish his employees with written statements reflecting all of this. It goes without saying that such activities require expenditures of time and of effort on the part of the employers.

Since the date when withholding was instituted in connection with the ordinary income tax, many persons have come to regard it as a customary part of our lives and have assumed, without any definite basis for such an assumption, that the imposition of the duty of withholding taxes upon an employer is constitutional.

However, neither as a matter of reasoning nor as a matter of authority should it be held lawful to impose such a duty of withholding taxes upon a domestic employer. To impose such a duty is to make an employer an unwilling tax collector, and a collector who receives no compensation for his services. The imposition of such a duty requires an employer to expend both his time and his property. In imposing such a requirement, the statutes violate the due process clause of the Fifth Amendment. A Court has so held in a similar situation. In *In Re Opinion of the Justices*, 190 Atl. 801, the statute under attack levied a tax upon the consumers of certain goods and required the retailers of such goods to collect the tax. In holding that it was unconstitutional to thus make a retailer an involuntary tax collector without com-

pensation, the Supreme Court of New Hampshire said:

"The duty thus devolved upon him to act as the collector of the tax without adequate compensation for the service a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. It would not be a service incidental to the ascertainment of his own taxes."

Similarly, in the instant case, the duty imposed upon Petitioners to withhold and pay over the taxes imposed upon their domestic employee is not a service incidental to the ascertainment of any tax imposed upon Petitioners. Rather, this service is solely incidental to the additional income tax which the statute levies upon the domestic employee. It is one thing—and a valid thing—to require that a taxpayer keep records and make reports relative to his own taxes. It is quite a different thing—and, it is submitted, a most unconstitutional thing—to require him to keep records and make reports relative to taxes imposed upon another, without compensating him for his services. As the New Hampshire Court held in the above case, such a requirement is confiscatory and is violative of due process.

In its opinion (R. 49), the Court of Appeals said that "withholding provisions have now become a familiar part of our system of taxation," and the Court cited three decisions wherein taxes with withholding provisions have been sustained by this Court. It is noteworthy, however, that in none of these decisions does there appear to have been any attack directed at the withholding features of these taxes.

Rather, this Court upheld the taxes against other attacks, and no ruling was made with respect to the matter of withholding. Petitioners agree with the Court of Appeals that withholding provisions "have now become a familiar part of our system of taxation." However, familiarity does not breed constitutionality, and the mere fact that withholding provisions have been complacently accepted by the public during the last few decades does not demonstrate that such provisions are valid when, as in the case at bar, their constitutionality is expressly challenged.

In *Monamotor Oil Company v. Johnson*, 292 U.S. 86, 54 S. Ct. 575, and in *Pierce Oil Corporation v. Hopkins*, 264 U.S. 137, 44 S. Ct. 251, this Honorable Court upheld gasoline tax statutes which required retailers to collect a tax laid upon consumers of gasoline. However, the gasoline tax cases are wholly inapplicable to the instant situation. In the New Hampshire case, *supra*, the Court recognized this and said that the withholding situation before it was:

"not parallel with that of distributors of gasoline and other motor fuels who are required to pay the tax thereon although it is in finality a tax against the ultimate consumer. *Such distributors must be licensed, and their duty to pay the tax is therefore a term of the license.*" (Italics added.)

In the *Hopkins* case, this Court seemingly recognized the correctness of such a rationale, for this Court stated:

"A short answer to this argument [that the withholding of gasoline taxes could not be required] is that the seller is directed to collect the tax from the purchaser when he makes the sale, and that a state

which has, under its Constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden."

The same line of reasoning would also appear to explain decisions such as *Citizens National Bank v. Kentucky*, 217 U.S. 443, 30 S. Ct. 532, and *Clement National Bank v. Vermont*, 231 U.S. 120, 34 S. Ct. 31, wherein banks have been required to withhold certain taxes imposed upon their depositors. As is true in the gasoline tax cases, banks can be required to perform this task because the banking business is one which is subject to licensing and regulation by the government.

However, as is stated above, the operation of a domestic household has not yet become an activity which the government can tax. Neither, it is hoped, have matters yet progressed so far that a license from the federal government could be required for the operation of a household. Unlike the situation with respect to a gasoline retailer or a bank, a householder does not occupy his or her status as a result of a government license or at the pleasure of the government. By accepting a gasoline dealer's license or a bank charter, a person doubtless places himself in a position in which the government can require him to withhold taxes. The same would appear to be true of any other business or occupation which is licensed by the government or which is subject to government regulation. However, by undertaking the duties of a householder, a domestic employer should not be held to have subjected himself to any such requirement.

To require a domestic employer to perform the tasks attendant to the withholding of taxes levied upon another is to deprive him of his liberty and property without due process of law.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOONEY, CLARK & MOORHEAD

R. DEAN MOORHEAD
Brown Building
Austin, Texas

Counsel for Petitioners

APPENDIX "A"

Two different types of taxes are levied by the Federal Insurance Contributions Act. Under 26 U.S.C. sec. 1410, there is levied upon an employer "an excise tax with respect to having individuals in his employ." Under 26 U.S.C. sec. 1400, there is levied an "additional income tax on employees," which is to be withheld from an employee's wages by the employer. Each of these taxes is levied at the rate of one and one-half percent of the "wages" paid to an employee.

The term "wages" is defined in 26 U.S.C. sec. 1426(a). Prior to January 1, 1951, the Act expressly provided that it did not embrace "domestic service in a private home," (former 26 U.S.C. sec. 1426 (b)(2)). However, by an amendment in 1950, which became effective on January 1, 1951 (64 Stat. 528, 536), this exemption was deleted, and the definition of the term "wages" which is contained in 26 U.S.C.A. sec. 1426(a) was altered so that it includes certain wages paid to domestic employees. Insofar as here pertinent, said statute now provides:

"(a) *Wages.* The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include:

"

". . .

"(7)(A) Remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in the private home of the employer.

"(B) Cash remuneration paid by an employer in any calendar quarter to an employee for domestic

service in a private home of the employer, if the cash remuneration paid in the quarter for such service is less than $50 or the employee is not regularly employed by the employer in such quarter of payment. For the purposes of this subparagraph, an employee shall be deemed to be regularly employed by an employer during a calendar quarter only if (i) on each of some twenty-four days during the quarter the employee performs for the employer for some portion of the day domestic service in a private home of the employer, or (ii) the employee was regularly employed (as determined under clause (i)) by the employer in the performance of such service during the preceding calendar quarter . . ."

By virtue of the elimination of the former exemption pertaining to domestic service in a private home, and by virtue of the foregoing change in the definition of the term "wages," the Federal Insurance Contributions Act is now applicable to persons such as Petitioners who hire domestic employees in their private home.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provisions and statute involved	2
Statement	2
Argument	4
Conclusion	9
Appendix	10

CITATIONS

Cases:

Brushaber v. *Union Pac. R. R.*, 240 U. S. 1 7
Foley Securities Corp. v. *Commissioner*, 106 F. 2d 731 8
Helvering v. *Davis*, 301 U. S. 619 4
Illinois Cent. R. Co. v. *Minnesota*, 309 U. S. 157 7
Magnano Co. v. *Hamilton*, 292 U. S. 40 8
New Colonial Co. v. *Helvering*, 292 U. S. 435 6
Oliver Iron Co. v. *Lord*, 262 U. S. 172 7
Rapid Transit Corp. v. *New York*, 303 U. S. 573 7
Sonzinsky v. *United States*, 300 U. S. 506 7
Steward Machine Co. v. *Davis*, 301 U. S. 548 ..... 4, 5, 6, 7, 8

Constitution and Statutes:

Constitution:

Article I:

Sec. 8 10
Sec. 9 ..... 5, 10

Internal Revenue Code:

Sec. 1400 (26 U. S. C. 1946 ed., Supp. IV., Sec. 1400) .. 2, 4, 11
Sec. 1401 (26 U. S. C. 1946 ed., Sec. 1401) 4, 11
Sec. 1410 (26 U. S. C. 1946 ed., Supp. IV., Sec. 1410) .. 2, 4, 12
Sec. 1426 (26 U. S. C. 1946 ed., Supp. IV., Sec. 1426) .. 4, 13

282970—53